FILE COPY

FILED
JAN 11 19
CHARLES ELMORE

IN THE

# Supreme Court of the United States

OCTOBER TERM 1932—No. 286.

THE NEW YORK CENTRAL RAILROAD COMPANY,

*Petitioner,*

—against—

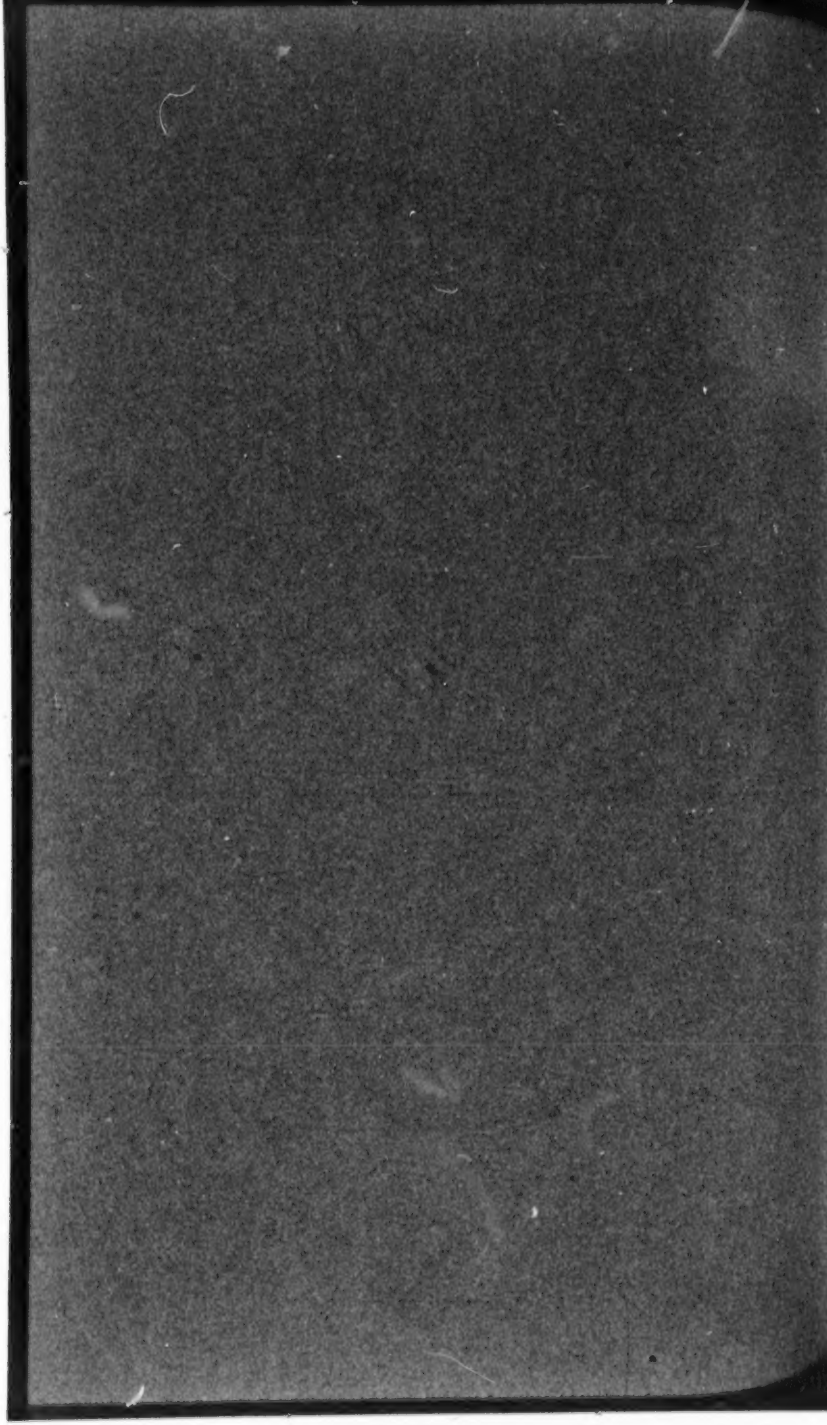
Steamtug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,

*Respondent.*

## REPLY BRIEF FOR PETITIONER.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
*Counsel for Petitioner.*

CLIVE C. HANDY,
*Of Counsel.*



# INDEX.

TABLE OF CASES CITED:


| | PAGE |
|---|---|
| *Atchison, T. & S. R. R. Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667 | 3 |
| *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474 | 4 |
| *Cutchogue*, 10 F. (2d) 671 (C. C. A. 2) | 6 |
| *Oregon Short Line & Un. Ry. Co.* v. *Northern Pac. R. Co.*, 51 Fed. 465, aff'd 61 Fed. 158 (C. C. A. 9) | 4 |
| *Pennsylvania Company* v. *U. S.*, 236 U. S. 351, 368-69 | 2 |
| *Sun Oil Co.* v. *Dalzell Towing Co., Inc., No. 38*, decided December 5, 1932 | 1, 3 |


OTHER AUTHORITIES CITED:


Interstate Commerce Act,

| | |
|---|---|
| Sec. 3, Par. 4 | 2 |
| Sec. 3, Par. 3 | 2, 3 |

IN THE

# Supreme Court of the United States

OCTOBER TERM 1932—No. 286.

THE NEW YORK CENTRAL RAILROAD COMPANY,
*Petitioner,*

—against—

Steamtug "TALISMAN", THE LONG ISLAND RAILROAD COMPANY,
*Respondent.*

## *REPLY BRIEF FOR PETITIONER.*

Since petitioner's brief was filed this court has rendered its decision affirming the decree of the Circuit Court of Appeals in the case of *Sun Oil Co.* v. *Dalzell Towing Co., Inc.*, No. 38, decided December 5, 1932.

As pointed out in petitioner's principal brief (pp. 17 and 18), the decision of this Court that there was a valid contract in that case giving an exemption from liability for the negligence of a pilot furnished in connection with a contract for towage is not a precedent for holding that there was a valid contract in this case, although if that contract had been held invalid, *a fortiori* the contention that there was a valid contract in this case could not have been supported.

The respondent apparently agrees with this position, for Sixth Point of respondent's brief bears the heading "The Towage And Pilotage Cases Are Not In Point" and the *Sun Oil* case is cited as a typical case (Respondent's Brief, p. 20).

The respondent's brief does not meet petitioner's argument that there was no "use" of respondent's "terminal

facilities" by the petitioner within the meaning of Sec. 3, Par. 4 of the Interstate Commerce Act, as amended, under the circumstances of this case, and ignores the apparently controlling authority to this effect—*Pennsylvania Company v. U. S.*, 236 U. S. 351, 368-69.

Respondent argues that

> "even if the situation came under paragraph 3, respondent was not precluded by any controlling principle of law from stipulating against liability for its own negligence" (Respondent's Brief, p. 11)

and suggests many details which might have been considered and taken care of, in any general agreement controlling the relations of these connecting carriers in their interchange of freight. If the parties had entered into such a general agreement and had included such a provision as here sought to be established, a quite different question would be presented. But that is not the question in this case.

The question here is whether the Long Island Railroad Company, having established its terminal, with float bridges at which carfloats may be moored while delivering or receiving freight cars and freight, pursuant to its obligation under Par. 3, Sec. 3 of the Interstate Commerce Act as amended to

> "afford all reasonable, proper and equal facilities for the interchange of traffic",

can by unilateral notice impose, as a condition of the use of such facilities for such interchange, a contract exempting that company from liability for its negligence not only in the ordinary handling of the float but, as in this case, in the handling of other equipment.

We submit that the petitioner in sending its carfloat to the terminal for the purpose of receiving or delivering freight there is entitled to the same common-law protection as any other member of the public from the negligent acts

of the claimant. The attempt of The Long Island Railroad Company to impose such a condition on the petitioner approaching its premises to do business is a violation both of its duty to the public and of its duty to a connecting carrier under Par. 3, Sec. 3 of the Interstate Commerce Act and is of no effect.

This Court has held that a connecting carrier must do business with another on the same basis as any other member of the public.

*Atchison T. & S. R. R. Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S. 667.

Although the decision in that case was that the connecting carrier has no greater rights than a member of the general public, we submit that on similar principles its right to do business with the connecting carrier should be no less.

Although the respondent frequently refers to the "use of respondent's terminal facilities" by the petitioner, that use was only such use as any member of the public would make in approaching respondent's terminal for the transaction of business with the respondent. In our principal brief we have used the analogy of an individual or a public drayman approaching the loading platform of any of respondent's freight stations for the purpose of receiving or delivering freight. Other analogies would be a private car or a taxicab delivering a passenger at a passenger station, or an individual entering the carrier's passenger or freight stations for the purpose of transacting any legitimate business with the carrier.

Petitioner did not enter upon respondent's premises or place cars upon its tracks. Petitioner merely placed its carfloat at the floatbridge so that an interchange of traffic might be made.

This Court in the *Sun Oil Co.* case, said:

"Respondent had no exclusive privilege or

> monopoly in respect of the services that petitioner desired to have performed for its tanker."

In these words this Court pointed out a vital distinction between that case and this. The Long Island Railroad did have a monopoly and as pointed out in State Court decision which the Circuit Court of Appeals ignored (quoted by Judge Knox, R. 9):

> "Plaintiff, willy nilly in the instant case, had to deal with defendant at its terminal."
>
> *B. & O. R. R. Co.* v. *L. I. R. R. Co.* (*The Patchogue*), 126 Misc. (N. Y.) 474.

We submit that to permit the respondent under such circumstances to impose such unreasonable terms as a condition of doing business with respondent at its terminal would be to create a most dangerous and far reaching precedent.

The respondent has cited the case of

> *Oregon Short Line & Un. Ry. Co.* v. *Northern Pac. R. Co.*, 51 Fed. 465, aff'd 61 Fed. 158 (C. C. A. 9th).

That case dealt with the question of whether one connecting carrier could insist on freight being received by the other in the cars in which it was already loaded. No such question arises in this case. It does not appear in this record whether The Long Island Railroad Company intended to remove cars from petitioner's float or place cars thereon, or remove from, or deliver to, cars on board the float such freight as was to be received or delivered. There appears here only the simple case of a carfloat approaching respondent's terminal for the purpose of exchanging freight in interstate commerce and making use only of the facilities of interchange which the respondent was required by the Statute to furnish.

It is again asserted in respondent's brief,

> "nor is any contention made that it (the notice) was not assented to" (Respondent's Brief, p. 17).

The contrary is the fact. We emphatically contend that the notice was not assented to. The respondent's counsel evidently refers to the fact that the petitioner did not reply to the notice, choosing to ignore the same as being invalid and of no legal effect.

We submit that the respondent could not by such a notice force the libellant to go to the expense of an appeal to the Interstate Commerce Commission and that under such circumstances as here presented the petitioner should not be penalized because of any possibility of a difference of opinion as to whether such an appeal was necessary.

It is suggested in petitioner's brief that:

> "The case involves solely the custody or handling of equipment belonging to one common carrier and temporarily in the possession of the other common carrier."

We dispute this statement emphatically. It does not appear in this record that the petitioner's carfloat was in the custody of, or handled by, the equipment of "the other common carrier", *i. e.,* the respondent. It appears only that the petitioner's float was "lying moored in Bridge No. 6" (R. 6) and had been received there "in connection with transportation in interstate commerce of freight cars and freight" (R. 7). There is no element of bailment involved in this case.

Respondent's brief (p. 7) again draws a distinction between the use of the terminal "for an interchange of traffic" and the use of the terminal "for a mooring place until towed away". Respondent thus again supports the validity

of the distinction made in Point III of the petitioner's brief (p. 20) and in Judge Knox's opinion (R. 10). There is no doubt a sound basis in fact for such a distinction, for carfloats occasionally lie at other parts of this terminal for indefinite periods after their business has been transacted and until they can be conveniently removed. This fact is developed in the case of *The Cutchogue,* 10 F. (2d) 671 (C. C. A. 2) on which respondent relies (Respondent's Brief, pp. 16-17, 19).

We reiterate that at most the effect of respondent's notice should be limited to carfloats while "lying at Long Island Railroad Company terminals" beyond "such reasonable periods of time" (R. 10), as required for the interchange of traffic. In establishing the affirmative defense on which the respondent relies, the burden of proof is undoubtedly on the respondent to establish that the liability in this case falls within the alleged contract. If there is any ambiguity such as suggested by the respondent (Respondent's Brief, p. 7), the respondent must fail.

***We submit that the decree of the Circuit Court of Appeals should be reversed.***

Respectfully submitted,

D. ROGER ENGLAR,
LEONARD J. MATTESON,
*Counsel for Petitioner.*

CLIVE C. HANDY,
*Of Counsel.*